

Chapter 173-700 WAC WETLAND MITIGATION BANKS

PART I OVERVIEW

173-700-010	Background
173-700-020	Purpose
173-700-030	Integrating banks with watershed planning
173-700-040	Applicability

PART II DEFINITIONS

173-700-100	Definitions
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PART III CERTIFICATION PROCESS

173-700-200	How does certification relate to other rules?
173-700-201	Why have a certification process?
173-700-202	Overview of the wetland mitigation bank certification process
173-700-203	Decision-making procedure
173-700-204	Dispute resolution
173-700-205	Dispute resolution procedure
173-700-220	Pre-application process
173-700-221	MBRT review of the prospectus
173-700-222	Purpose of the prospectus
173-700-223	Content of the prospectus
173-700-224	Optional MBRT pre-application meetings
173-700-230	Formal application phase
173-700-231	What happens after an application is submitted?
173-700-232	Review of the application
173-700-233	Department's certification decision
173-700-234	Local jurisdiction's certification decision
173-700-235	Signatories of the bank instrument
173-700-240	The bank instrument
173-700-241	Contents of the bank instrument
173-700-250	Public involvement
173-700-251	Public outreach
173-700-252	Joint public notices

173-700-253	Notifying the public of certification applications
173-700-254	Who is notified of an application?
173-700-255	Length of comment period
173-700-256	Requesting a public hearing
173-700-257	When is a public hearing held?
173-700-258	Public records

PART IV

BANK ESTABLISHMENT –

TECHNICAL REQUIREMENTS

173-700-300	Ecological design incentives
173-700-310	Service area
173-700-311	Criteria for determining service area size
173-700-320	Site selection
173-700-330	Assessment of wetland functions
173-700-340	Minimum buffers
173-700-350	Credit description
173-700-351	Types of credits
173-700-352	Determination of credits
173-700-353	Default method for determining credits
173-700-354	Wetland credit conversion rates
173-700-355	Criteria for determining conversion rates for wetlands
173-700-356	Conversion rates for uplands and buffer areas
173-700-357	Criteria for determining conversion rates for uplands and eligible Buffer areas
173-700-358	Exceptions to credit conversion ranges
173-700-359	Using an alternative method to calculate credits
173-700-360	Credits for preservation
173-700-361	Determining high quality wetland systems for preservation
173-700-370	Schedule for the release of credits
173-700-371	Limits on credit releases
173-700-372	Credit release - pre-construction
173-700-373	Credit release - after construction
173-700-374	Credit release – attainment of hydrologic performance standards
173-700-375	Credit release - final release
173-700-376	Additional credit releases
173-700-380	Performance standards
173-700-390	Financial responsibility
173-700-391	Financial assurances
173-700-392	Levels of financial assurances
173-700-393	Financial assurances for construction
173-700-394	Financial assurances for short-term management

173-700-395 Financial assurances for long-term management

**PART V
OPERATION OF BANKS**

173-700-400 Monitoring
173-700-401 Monitoring plan
173-700-402 Contingency plans
173-700-403 Duration of monitoring
173-700-404 Monitoring reports
173-700-405 As-built reporting

173-700-410 Obtaining credit releases
173-700-411 Recording credit transactions
173-700-412 Accounting and tracking of credit transactions
173-700-413 Credit-tracking ledger
173-700-414 Annual account reporting
173-700-415 Master ledger
173-700-416 Random audits

173-700-420 Short-term management
173-700-421 Long-term management
173-700-422 Permanent protection
173-700-423 Conservation easements for wetland banks

**PART VI
USE OF WETLAND BANK CREDITS**

173-700-500 Available credits
173-700-501 Projects eligible to use a bank
173-700-502 Replacement ratios for debit projects
173-700-503 Use of credits for fish habitat and hydrologic functions
173-700-504 Use of credits outside of the service area
173-700-505 Use of credits for more than one permit

**PART VII
COMPLIANCE WITH CERTIFICATION**

173-700-600 Compliance with the terms of certification
173-700-610 Contingency actions
173-700-611 Notice of required contingency actions
173-700-612 Compliance with required contingency actions
173-700-620 Adjustments in total credits
173-700-630 Suspension of credit use

PART VIII

ROLES AND RESPONSIBILITIES

173-700-700	Responsibilities of the bank sponsor
173-700-710	Role of the department
173-700-720	Role of local jurisdiction(s)
173-700-730	Role of the mitigation bank review team
173-700-731	Mitigation bank review team responsibilities
173-700-732	Mitigation bank review team membership
173-700-740	Role of the banks' signatories
173-700-750	Role of permitting agencies authorizing use of credits

PART IX APPEALS

173-700-800	Appeals process
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PART I

OVERVIEW

173-700-010 Background (1) The Wetlands Mitigation Banking Act, Chapter 90.84 RCW, sets forth fundamental elements of a mitigation banking policy to ensure that a predictable, statewide process exists for certifying environmentally sound wetland mitigation banks.

(2) The act finds wetland mitigation banking an important regulatory tool for providing compensatory mitigation for unavoidable impacts to wetlands and declares it the policy of the state to support wetland mitigation banking. The act directs the department of ecology (the department) to adopt rules establishing a statewide process for certifying wetland mitigation banks.

(3) The department anticipates that wetland mitigation banks will provide some compensatory mitigation in advance of impacts to wetlands and will consolidate compensatory mitigation into larger contiguous areas for regionally significant ecological benefits.

(4) Wetland mitigation banks (banks) prioritize restoration of wetland functions and as such should be complementary to the restoration of ecosystems and ecosystem processes as identified in state or locally adopted science-based watershed management plans.

173-700-020 Purpose (1) This rule is intended to facilitate wetland mitigation banking by providing an efficient, predictable statewide framework for the certification and operation of environmentally sound wetland mitigation banks. In addition, this rule sets out to accomplish the following:

- (a) Provide a systematic approach for reviewing and approving environmentally sound wetland mitigation banks;
- (b) Provide for the timely review of bank proposals;
- (c) Establish coordination among state and local agencies involved in the certification and approval of banks;
- (d) Avoid duplication with federal processes by encouraging early involvement with federal agencies; and
- (e) Provide incentives to encourage bank sponsors to locate and design banks that provide the greatest ecological benefits.

(2) The purpose of this rule is to support the establishment of wetland mitigation banks as an important tool for providing compensatory wetland mitigation by authorizing state agencies, local governments and private entities to achieve the goals of the authorizing statute, Chapter 90.84 RCW.

173-700-030 Integrating banks with watershed planning (1) This rule should facilitate the establishment and operation of wetland mitigation banks that are integrated with local land-use plans and science-based watershed or sub-watershed management plans.

(2) Local and state agencies are encouraged to use wetland mitigation banks as a useful tool for implementing watershed management plans. Wetland banks can restore habitats and functions that are priorities within the watershed.

(3) Wetland banks should experience an expedited review process when they are established as part of a science-based resource management program, which has been endorsed by state and federal resource agencies.

173-700-040 Applicability This rule applies to private and public wetland mitigation banks established under Chapter 90.84 RCW.

PART II

DEFINITIONS

173-700-100 Definitions

“Aquatic Resources” means those areas where the presence and movement of water is a dominant process affecting their development, structure, and functioning. Aquatic resources may include, but are not limited to, vegetated and non-vegetated wetlands or aquatic sites (e.g. mudflats, deepwater habitats, lakes and streams).

"As-built plans" means a document, that describes the physical, biological and, if required, the chemical condition of a compensatory bank site after complete implementation of each phase of an approved construction plan.

“Available credits” means those credits that have been released by the department and can be used. Available credits do not include credits that have been debited (used for a permit requirement) from the bank.

“Bank” or “wetland mitigation bank” means a site where wetlands are restored, created, enhanced, or in exceptional circumstances, preserved, expressly for the purpose of providing compensatory mitigation in advance of authorized impacts to aquatic resources.

"Bank instrument" means the documentation of agency and bank sponsor concurrence on the objectives and administration of the bank. The “bank instrument” describes in detail the physical and legal characteristics of the bank, including the service area, and how the bank will be established and operated.

"Bank sponsor" means any public or private entity responsible for establishing and, in most circumstances, operating a bank.

"Buffer" means those areas surrounding a bank site that enhance and protect a wetland's functions and values by maintaining adjacent habitat and reducing adverse impacts from adjacent land-uses.

"Compensatory mitigation" means the restoration, creation, enhancement or in exceptional circumstances, preservation of wetlands or other aquatic resources, or both, for the purpose of compensating for unavoidable adverse impacts to wetlands or other aquatic resources

which remain after all appropriate and practicable avoidance and minimization has been achieved.

“Consensus” means a process by which a group synthesizes its ideas and concerns to form a common collaborative agreement acceptable to all members. While the primary goal of consensus is to reach agreement on an issue by all parties, unanimity may not always be possible.

“Contingency actions” means actions taken during the operational life of a bank site to correct any deficiencies on the site in order for the site to attain the required performance standards.

“Cowardin class” means the classification of a wetland area as described in *Classification of Wetlands and Deepwater Habitats of the United States* USFWS publication FWS/OBS 79/31.

“Creation” means the establishment of wetland area, functions, and values in an area where none previously existed.

“Credit” means a unit of trade representing the increase in the ecological value of the site, as measured by acreage, functions, and values, or by some other assessment method.

“Debit project” means those projects that use credits from a wetland mitigation bank to fulfill regulatory requirements for compensation of impacts to aquatic resources. A debit project may require more than one regulatory approval under federal, state and local rules.

“Department” means the department of ecology.

“Ecoregions” means those areas that are considered to be regions of relative homogeneity in ecological systems or in relationships between organisms and their environments.

“Enhancement” means actions taken within an existing degraded wetland or other aquatic resource to increase or augment one or more functions or values. Enhancement can also include actions taken to improve the functions provided by a buffer or upland area.

“Financial assurance” means the money or other form of financial instrument (for example surety bonds, trust funds, escrow accounts, proof of stable revenue sources for public agencies) required of the sponsor to ensure that the functions of the subject bank are achieved and maintained over the long-term in accordance with the terms and conditions of the bank instrument.

“Function assessment” means an assessment of the degree to which a wetland is performing, or is capable of performing, specific wetland functions. Function assessments include the use of scientifically-based quantitative and qualitative methods developed for assessing functions, as well as the use of best professional judgement for determining the degree to which a wetland or other habitat is performing, or is capable of performing, specific functions.

“Hydrogeomorphic (HGM) classification” means a wetland classification scheme that groups wetlands based on their geomorphic setting and water regime.

“Local jurisdiction” means any local government such as a town, city, or county.

“Mitigation” means sequentially avoiding impacts, minimizing impacts, and compensating for remaining unavoidable impacts to wetlands.

"Mitigation bank review team" or "MBRT" means an interagency group of federal, state, tribal and local regulatory and resource agency representatives that are invited to participate in negotiations with the bank sponsor on the terms and conditions of the bank instrument.

"Mitigation bank review team process" or "MBRT Process" means a process in which the department strives to reach consensus with the MBRT members on the terms, conditions, and procedural elements of the bank instrument.

"Operational life" or "operational life of a bank" means the period during which the terms and conditions of the bank instrument are in effect. With the exception of arrangements for the long-term management, permanent protection, and financial assurances, the operational life of a mitigation bank terminates at the point when:

- (a) Compensatory mitigation credits have been exhausted and the debited bank is determined to be functionally mature and self-sustaining to the degree specified in the bank instrument; or
- (b) The bank sponsor voluntarily terminates the banking activity with written notice to the department.

"Performance standards" are measurable benchmarks for a specific project objective. Performance standards are usually designed to allow evaluation of the development of ecological characteristics associated with specific wetland functions.

"Potential credits" mean the credits anticipated to be provided at a bank site, but which are not available for use. Once potential credits are released by the department, they convert to available credits.

"Practicable" means available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.

"Preservation" means the permanent protection of ecologically important wetlands or other aquatic resources through the implementation of appropriate legal and physical mechanisms. Preservation may include protection of upland areas adjacent to wetlands as necessary to ensure protection or enhancement of the aquatic systems, or both.

"Prospectus" is the conceptual proposal for a mitigation bank project.

"Restoration" means actions taken to intentionally re-establish wetland area, function and values at a site where wetlands previously existed, but are no longer present because of the lack of water or hydric soils. Restoration can also include the re-establishment of historic wetland HGM classes on sites that have been altered due to human activities to a different HGM class, and which are significantly degraded with low levels of functions and values.

"Service area" means the designated geographic area in which a bank can reasonably be expected to provide appropriate compensation for unavoidable impacts to wetlands.

"Signatories" means those entities that have documented their approval of the terms and conditions of the bank instrument through their signature on the bank instrument.

"Sustainability" means the ability of the aquatic system to be self-maintaining and self-regulating. Sustainable bank sites must have sufficient buffer areas to protect the site from degradations due to activities on adjacent lands.

"Unavoidable" means adverse impacts that remain after all appropriate and practicable avoidance and minimization have been achieved.

"Water resource inventory areas" or **"WRIA"** refers to the sixty-two water resource divisions of the state as described in Chapter 173-500 WAC, Water Resources Management Program Established Pursuant to the Water Resources Act of 1971, as amended.

"Wetland" or **"wetlands"** mean areas that are inundated or saturated by surface water or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

"Wetland mitigation bank" or **"bank"** means a site where wetlands are restored, created, enhanced, or in exceptional circumstances, preserved, expressly for the purpose of providing compensatory mitigation in advance of authorized impacts to aquatic resources.

PART III

CERTIFICATION PROCESS

173-700-200 How does certification relate to other rules? (1) Many federal, state, and local laws and rules and treaty rights relate to the establishment of a compensatory wetland mitigation bank.

(2) Mitigation banks certified under this rule must be consistent with existing federal, state and local laws and rules.

(3) Certification of a wetland bank does not serve as authorization for other federal, state or local permits or approvals.

(4) Mitigation Bank Review Team (MBRT) members shall advise the bank sponsor of pertinent federal state or local rules that may apply to a specific bank proposal and that may delay the certification process.

173-700-201 Why have a certification process? The department must certify banks to ensure that they are technically feasible, environmentally sound, and in compliance with this rule.

173-700-202 Overview of the wetland mitigation bank certification process (1) The certification process for wetland mitigation banks contains two parts. The first part is a pre-application process followed by a formal application process.

(2) The *pre-application process* begins when a bank sponsor submits a prospectus to the department.

(3) The department convenes a Mitigation Bank Review Team (MBRT) after determining that the prospectus contains sufficient information.

(4) The MBRT reviews and evaluates the bank prospectus and provides comments to the bank sponsor on the proposed bank.

(5) The bank sponsor develops a bank instrument using the comments provided by the MBRT on the prospectus.

(6) The ***formal application process*** begins when the bank sponsor submits a certification application and bank instrument to the department.

(7) The department determines if the application is complete.

(8) The department reconvenes the MBRT to review the complete application.

(9) The department begins the public comment period under WAC 173-700-232.

(10) The department issues a certification decision and notifies the local jurisdiction(s) in which the bank is located of that decision.

(11) The local jurisdiction(s) reviews the certification decision and determines whether it concurs with the department's decision.

(12) ***Certification is complete*** when the department, the local jurisdiction(s), and the bank sponsor all sign the bank instrument.

173-700-203 Decision-making procedure (1) All decisions rendered by the department must fully consider MBRT and public comments submitted as part of the certification evaluation process.

(2) The MBRT shall strive to achieve *consensus* on the terms and conditions of bank instruments.

(3) If the department determines that consensus cannot otherwise be reached on any term, condition, or procedural element of the bank instrument within a reasonable timeframe, the department shall be responsible for making final decisions regarding the terms and conditions of the bank instrument.

(4) Advisory members of the Mitigation Bank Review Team may participate in MBRT discussions, however they may not participate in the decision-making of the MBRT. See WAC 173-700-732.

173-700-204 Dispute resolution (1) In the event that the MBRT is unable to reach consensus on any element of the bank certification, the department shall initiate the dispute resolution procedure under WAC 173-700-205.

(2) The department shall make every effort to resolve disputes within the MBRT forum before the conflict is elevated to the program manager of the department's Shorelands and Environmental Assistance Program.

173-700-205 Dispute resolution procedure The department shall use the following dispute resolution procedure for resolving concerns from members of the MBRT.

(1) The MBRT member(s) who has concerns with a particular decision or element of a bank certification shall submit the concern and accompanying rationale in writing to the chair(s) of the MBRT.

(2) The chair(s) of the MBRT shall outline the majority position on the area of concern and shall work with the MBRT member(s) to develop potential solutions to the member's concerns.

(3) The chair(s) of the MBRT shall present potential solutions to the MBRT and the MBRT shall work to resolve the concern.

(4) In the event that the MBRT is unable to resolve the concern, the MBRT member with the concern shall secure and pay for a facilitator to assist the MBRT in resolving the conflict.

(5) In the event that the MBRT is still unable to reach consensus, the MBRT member with the concern may request, through written notification, that the department's program management reviews the issue. Such a notification must include:

- (a) A detailed description of the issue, and
- (b) Recommendations for resolution.

(6) The written notification must be directed to the program manager of the Shorelands and Environmental Assistance Program or the program manager's designee. Within twenty days of receipt of a notification, the program manager, or its designee, shall contact the MBRT member and shall make a final decision. The resolution shall be forwarded to the other MBRT members.

173-700-220 Pre-application process (1) The bank sponsor must submit a prospectus, consistent with the requirements in WAC 173-700-223, to the department.

(2) The department must determine whether the prospectus contains enough information to form a Mitigation Bank Review Team (MBRT).

(a) If the department determines that the prospectus is not sufficient: the department shall notify the bank sponsor and identify any additional information necessary to complete the prospectus.

(b) If the department determines that the prospectus is sufficient, the department shall notify the local jurisdiction(s) and invite it to co-chair the MBRT.

(c) If the prospectus is sufficient, the department must invite representatives from the appropriate federal, state, and local regulatory and resource agencies, and tribes to participate on the MBRT. The department may invite advisory members to the MBRT under WAC 173-700-732

(3) The bank sponsor must send the department enough copies of the prospectus for all of the members of the MBRT.

(4) At least two weeks before a MBRT meeting, the department must send the prospectus to all agencies and tribes participating on the MBRT.

173-700-221 MBRT review of the prospectus (1) The MBRT shall strive to meet within sixty days of when the department notifies it of a new bank prospectus.

(2) The MBRT must meet to evaluate the technical and regulatory feasibility of a prospectus.

(3) The members of the MBRT shall provide comments to the department and the bank sponsor on the bank prospectus. Comments should include:

- (a) The technical feasibility of the bank proposal;
- (b) Its compliance with existing rules and ordinances;
- (c) Any applicable permits or authorizations necessary for bank construction; and
- (d) Any additional information necessary for the draft bank instrument, such as supporting studies and other documentation.

(4) The bank sponsor must use the comments received from the MBRT to develop a bank instrument, which is consistent with the requirements in WAC 173-700-240 and WAC 173-700-241.

(5) After completing the bank instrument, the sponsor may formally apply for wetland bank certification under WAC 173-700-230.

173-700-222 Purpose of the prospectus (1) The purpose of the prospectus is to provide a conceptual plan for a wetland mitigation bank proposal.

(2) The prospectus initiates dialogue with the department and MBRT members on a proposed bank.

(3) A prospectus must contain sufficient information to allow the department and the MBRT to provide feedback to the bank sponsor on whether the bank project is technically feasible and complies with existing state and local rules. Necessary information includes discussions of the proposed goals and objectives, the construction, and operation of the proposed bank.

173-700-223 Content of the prospectus At a minimum, the prospectus must contain information on the following elements:

(1) The goals and objectives of the project;

(2) Site location information, including a detailed map with sufficient information to accurately identify site location, such as legal description and proximity to existing roads;

(3) The rationale for site selection addressing the considerations listed in WAC 173-700-320;

(4) A description of existing conditions of the proposed site(s) including, but not limited to:

- (a) Land ownership;
- (b) The landscape position of the site;
- (c) Site size;
- (d) Wetlands present on the site;

- (e) Other habitat types present on the site;
 - (f) Available information on water sources, soils, and vegetation; and
 - (g) A preliminary analysis of functions provided by on-site wetlands;
- (5) Conceptual site design, including but not limited to:
 - (a) Proposed types and approximate sizes of wetlands;
 - (b) Other proposed habitat types to be provided on the site; and
 - (c) Proposed functions that the bank is anticipated to provide;
 - (6) Potential adverse impacts to aquatic resources or other habitats from bank construction;
 - (7) Proposed service area and accompanying rationale that demonstrates that the service area is ecologically appropriate;
 - (8) Anticipated potential credits to be generated by the bank;
 - (9) Discussion of whether water rights have been applied for or secured for the site, if needed;
 - (10) Demonstration of adequate financial resources for the construction, operation, and long-term management of the bank site; and
 - (11) Description of proposed permanent protection mechanism, such as a conservation easement.

173-700-224 Optional MBRT pre-application meetings (1) If a bank sponsor wants assistance from the MBRT during the drafting of a bank instrument, the bank sponsor may request that the department schedule an additional meeting(s) with the MBRT.

(2) If additional meetings are requested, the bank sponsor must submit to the department a draft bank instrument, consistent with the requirements of WAC 173-700-241, and sufficient copies of the instrument for distribution to the MBRT members.

(3) The department must reconvene the MBRT if:

- (a) The sponsor requests another meeting with the MBRT;
- (b) The bank sponsor submits a complete draft bank instrument with sufficient copies for the MBRT members to the department; and
- (c) The department determines that the new draft bank instrument warrants another meeting with the MBRT.

(4) The MBRT shall provide comments to the department and the bank sponsor regarding any terms and conditions required for the bank instrument.

173-700-230 Formal application phase (1) The bank sponsor shall submit a complete certification application to the department.

(2) A complete application consists of the following:

- (a) A completed wetland bank certification application form;
- (b) A draft bank instrument consistent with the requirements of WAC 173-700-241;
- (c) A completed checklist under RCW Chapter 43.21C, the State Environmental Policy Act;

- (d) A Joint Aquatic Resources Permit Application (JARPA), if necessary; and
 - (e) Other supporting information as required by the department through the MBRT process.
- This supporting information may include, but is not limited to:
- (i) Financial assurance documents;
 - (ii) Legal mechanisms for the permanent protection of the bank site; and
 - (iii) Hydrologic and other ecological studies.

173-700-231 What happens after an application is submitted? (1) After receiving the application, the department shall determine whether the application is complete.

- (a) If the department determines that the application is not complete, the department shall notify the bank sponsor of its determination and identify any additional information that is necessary to complete the application.
- (b) If the department determines that the application is complete, the department shall notify the bank sponsor of its determination and assign a bank application number to the application.

(2) After the department notifies the bank sponsor that the application is complete, the bank sponsor must submit to the department sufficient copies of the draft bank instrument for distribution to MBRT members.

173-700-232 Review of the application (1) Upon determining the application is complete and after receiving sufficient copies of the bank instrument from the bank sponsor, the department must notify and reconvene the MBRT.

(2) After determining that the application is complete, the department must also initiate the public notification, review, and comment process under WAC 173-700-252 through WAC 173-700-255.

(3) The MBRT shall review the draft bank instrument and provide comments to the department and the bank sponsor on the technical requirements, terms, and conditions of the proposed certification.

173-700-233 Department's certification decision (1) After the public comment period closes and the MBRT has concluded the review of the proposal, the department must:

- (a) Notify the bank sponsor of all recommendations and comments received from the MBRT and the public;
- (b) Identify any additional information that the sponsor must submit in order for the department to make a certification decision; and
- (c) Identify additional terms and conditions required as part of the certification.

- (2) If the department requests additional information:
 - (a) The certification process shall stop until the information is received and approved by the department; and

(b) The department may reconvene the MBRT or reopen the public comment period if the department determines that the bank instrument has changed substantially.

(3) After review of the application is complete, the department shall issue a certification decision.

(4) The department shall indicate its approval of certification by signing the bank instrument. After signing the bank instrument, the department must notify the local jurisdiction and request its concurrence on the certification.

(5) If the application is denied, the department must send a notification to the bank sponsor and to the local jurisdiction in which the proposed bank is located. The notification must state the reasons for denial.

173-700-234 Local jurisdiction's certification decision (1) After receipt of the department's decision to approve certification, the local jurisdiction(s) in which the bank will be located shall review the certification decision.

(2) If the local jurisdiction(s) concurs with the bank certification, it must sign the bank instrument.

(3) If the local jurisdiction(s) does not concur with the certification, the local jurisdiction must send a notification to the bank sponsor and the department of its decision. The notification must state the reasons for the local jurisdiction's non-concurrence.

(4) If the local jurisdiction(s) does not concur with the certification, the department may not certify the bank.

173-700-235 Signatories of the bank instrument (1) A bank instrument must contain signatures from the department, the local jurisdiction(s) in which the bank will be located, and the bank sponsor for certification to be complete.

(2) No agency, except for the department and the local jurisdiction in which the bank is located, is required to sign a bank instrument in order for certification to be complete. However, MBRT member agencies and tribes are encouraged to sign a bank instrument to document their concurrence with the terms and conditions of the certification.

(3) If any other agency or tribe signs the bank instrument, it shall signify that entity's concurrence with the terms of the bank instrument.

173-700- 240 The bank instrument (1) A bank instrument details all of the physical characteristics, legal obligations, operational procedures, monitoring, and maintenance requirements for a wetland mitigation bank.

(2) Requirements for bank instruments vary based on the specific conditions of the bank site and should be developed in cooperation with the MBRT.

(3) The bank sponsor must develop the bank instrument using feedback from the MBRT on the prospectus and, if applicable, MBRT comments on a preliminary draft bank instrument.

173-700-241 Contents of the bank instrument The minimum elements required in the bank instrument are:

- (1) A statement of bank goals and objectives;
- (2) Documentation of the ownership of bank lands, including a legal description and map of the bank site and surrounding areas;
- (3) A detailed description of bank sponsor responsibilities for construction implementation, monitoring and reporting, maintenance, and credit tracking and reporting;
- (4) A description and map of the geographic service area;
- (5) The potential number of credits to be generated by the bank and a credit description consistent with WAC 173-700-350;
- (6) A description of the types of impacts to wetlands or other aquatic resources suitable for compensation and any restrictions on uses of credits;
- (7) A detailed description of the proposed bank including, but not limited to:
 - (a) The bank size;
 - (b) The landscape position of the site;
 - (c) The Cowardin and HGM classes and sizes of wetlands and aquatic resources proposed for the bank;
 - (d) A description of the buffers for the site and any other habitats provided on the site;
 - (e) The functions and values to be provided by the bank;
 - (f) Detailed site design plans and specifications to include grading plans, planting plans, and specifications for any structures; and
 - (g) Construction timing and schedules;
- (8) A description of existing ecological baseline conditions at the bank site, including supporting documentation requested by the department, through the MBRT process. The description must include, at a minimum:
 - (a) Technical data on water sources and soils;
 - (b) Wetlands present on the site;
 - (c) Other habitat types present on the site;
 - (d) Existing vegetation communities; and
 - (e) Analysis of functions provided by on-site wetlands;
- (9) Documentation of water rights for the proposed bank, if required;
- (10) Credit tracking and accounting procedures, including reporting requirements;
- (11) Performance standards for determining credit release and bank success, including a schedule for the phased release of credits;
- (12) Reporting protocols and monitoring plan, including a clear statement of responsibility for conducting monitoring and for reporting;
- (13) A contingency plan and statement of responsibility for contingency actions;
- (14) Appropriate financial assurances;

(15) Provisions for short-term and long-term management and maintenance, including a description of anticipated management and maintenance activities;

(16) Provisions for permanent protection of the property on which the bank will be located; and

(17) Force Majeure Clause (identification of sponsor responsibilities in the event of catastrophic events that are beyond the sponsor's control).

173-700-250 Public involvement (1) It is the department's goal to ensure that accurate certification information is made available to the public in a timely manner, and to avoid duplicative processes for public involvement.

173-700-251 Public outreach Applicants are strongly encouraged to solicit public input during the pre-application phase of bank certification.

173-700-252 Joint public notices (1) The department shall use existing public processes, whenever possible, to obtain public comment on a proposed bank certification. When an existing process is available to solicit public comment on a certification, the department shall strive to provide a joint public notice.

(2) The public notice for bank certification must include the information under WAC 173-700-253 and WAC 173-700-254.

(3) When an existing public notification process for the proposal is not available, the department shall issue a public notice on the proposed bank certification under WAC 173-700-253 through WAC 173-700-255.

173-700-253 Notifying the public of certification applications The department must notify the public of an application for certification. Public notice for the wetland bank certification shall include:

(1) Name and address of the department staff contact for information on the certification application;

(2) Name and address of the bank sponsor;

(3) A description of the bank proposal including, but not limited to, the following information:

(a) The location of the proposed bank site;

(b) The types of wetlands to be restored, enhanced, created or preserved on the bank site;

(c) The number and types of credits proposed;

(d) The service area proposed for the bank; and

(e) The credit release schedule proposed for the bank;

(4) Name, address, and telephone number of a person from whom interested persons may obtain further information, such as copies of the application, the draft bank instrument and supporting materials; and

- (5) A brief description of the comment procedures, including:
- (a) The time and place of any hearings scheduled for the certification;
 - (b) Where comments should be sent;
 - (c) The closing date for receiving comments; and
 - (d) The procedures to request a hearing.

173-700-254 Who is notified of an application? At a minimum, the department shall notify the following members of the public of the application for certification:

- (1) Local and tribal governments located within the proposed service area, other interested persons and organizations that have requested information on wetland bank certifications, and all others deemed appropriate by the department;
- (2) The latest recorded real property owners located within 300 feet of the boundaries of the property upon which the wetland bank site is proposed, as shown by the records of the county treasurer; and
- (3) The general public within a bank's proposed service area through:
 - (a) A published notice in a newspaper of general circulation in the service area of the proposed bank and in other counties as deemed appropriate, and
 - (b) A notice posted in a conspicuous manner on the property upon which the proposed bank is to be located.

173-700-255 Length of comment period (1) The department must provide at least thirty-days for the public comment.

- (2) Wetland banks that require an environmental impact statement may need longer comment periods.
- (3) The comment period may be extended if the department holds a public hearing for a wetland bank proposal.

173-700-256 Requesting a public hearing (1) The bank sponsor, any interested government entity, any group or any person may request, in writing, a public hearing on the bank certification.

- (2) The request must be received by the department before the end of the comment period specified on the public notice.
- (3) Any request for a public hearing shall indicate the interest of the party filing it and why a hearing is warranted.

173-700-257 When is a public hearing held? (1) The department shall determine, in its sole discretion, if significant public interest exists to hold a public hearing.

- (2) The department shall provide at least fourteen calendar days prior notice of any hearing.

173-700-258 Public records (1) The department must make available for public inspection the certification application, draft bank instrument and other supporting materials.

(2) The department shall keep a record of the comments received by the department and issues raised during the public participation process on the bank certification. Those records are available to the public.

(3) The department may not render a certification decision until the public comment period is complete.

PART IV

BANK ESTABLISHMENT – TECHNICAL REQUIREMENTS

173-700-300 Ecological design incentives (1) One of the goals of the wetland banking certification program is to encourage banks that provide significant ecological benefits. In order to achieve this, incentives have been built into the certification and bank establishment process to encourage the siting and designing of banks that provide significant ecological benefits.

(2) The incentives include, but are not limited to, more favorable credit conversion rates, higher releases of credits, and larger service areas. For each of these elements, banks that satisfy more of the decision-making criteria or that satisfy those criteria to a higher degree generally receive more favorable conditions. The department, through the MBRT process, shall make decisions regarding the application of specific incentives on a case-by-case basis.

(3) Bank sponsors should consult the following sections of this rule for criteria that the department shall use for its decision-making:

- (a) Determining the amount of credit generated by a bank site under WAC 173-700-355 and WAC 173-700-357;
- (b) The designation of service areas under WAC 173-700-311; and
- (c) The scheduling of credit releases under WAC 173-700-372 through WAC 173-700-375.

(4) The department shall encourage, with better credit conversion rates, banks that include restoration of wetland systems and banks that provide significant habitat value because they provide connections or corridors to other natural areas.

173-700-310 Service area (1) The department, through the MBRT process, must determine the appropriate service area for proposed banks.

(2) The bank sponsor must describe and include a map of the bank's proposed service area in the draft bank instrument.

(3) The extent of the service area must be based on the functions provided by the bank and the distance from the bank site that the ecological functions can reasonably be expected to compensate for impacts to wetlands. The department must consider the

hydrologic and biotic criteria as identified in WAC 173-700-311 when designating a service area.

173-700-311 Criteria for determining service area size The size of a service area must be determined based on the following elements:

- (1) The functions provided by the bank;
- (2) Whether and how far the ecological and hydrological benefits of the bank extend beyond the bank site location;
- (3) The landscape position of the bank site within the watershed;
- (4) The WRIA in which the bank is located;
- (5) The ecoregion in which the requested service area is located;
- (6) The ecological sustainability of the bank site;
- (7) The quality, diversity, and regional significance of the habitats provided;
- (8) Local needs and requirements, such as consistency with land-use or watershed management plans;
- (9) Consideration of the types of impacts to wetlands or other aquatic resources that may be compensated through the use of credits from the banks; and
- (10) Available information on baseline conditions in the requested service area such as that found in watershed management plans, function assessments, wetland mapping or inventories, storm water management plans, and comprehensive land use plans.

173-700-320 Site selection (1) Mitigation banks must be planned and designed to be self-sustaining over time. The department and the MBRT shall carefully consider ecological sustainability and suitability when determining if a site is an appropriate location for a mitigation bank.

- (2) Considerations shall include, but are not limited to:
 - (a) Whether the site includes areas that can be restored to wetland conditions;
 - (b) Whether the site possesses the physical, chemical and biological characteristics to support the bank goals and objectives;
 - (c) Whether the size and location of the bank is appropriate relative to the ecological features found at the site, such as sources of water;
 - (d) If the bank sponsor has obtained any necessary water rights for the site, if necessary;
 - (e) The wetland functions and values that the site has the potential to provide;
 - (f) Whether the bank site can provide increased or improved wetland functions and restore ecological processes within the basin or the watershed;
 - (g) If the bank site has a high potential to connect or complement existing wetlands;
 - (h) The types of unavoidable impacts that are anticipated to use bank credits for compensatory mitigation;

- (i) Whether the site and bank objectives are compatible with surrounding land-uses lying both up and down gradient;
- (j) Whether the bank site can be protected over time from direct, indirect, and cumulative impacts due to current and foreseeable future land-uses;
- (k) Whether the bank site is consistent with existing planning documents, such as watershed, zoning, or comprehensive land-use plans and critical areas rules;
- (l) Whether the bank site contributes to the improvement of identified management problems within the drainage basin or watershed, such as sedimentation, water quality degradation, or flood control;
- (m) What the historical land-uses were at that site;
- (n) The presence and quantity of invasive species on the site;
- (o) The existence of a native seed bank on the site;
- (p) Whether the process of establishing the bank at the site will compromise ecologically significant aquatic or upland resources, cultural sites, or habitat for threatened, endangered, or candidate species; and
- (q) The degree of long-term maintenance necessary for the site.

(3) The establishment and use of mitigation banks in or adjacent to areas of national, state, or regional ecological significance is encouraged if the establishment and operation of the mitigation bank does not compromise the protection or functioning of the ecologically significant areas.

173-700-330 Assessment of wetland functions (1) The sponsor must assess the ecological functions provided by the bank site based on a method specified in the bank instrument.

(2) The department may require a sponsor to use either a “best professional judgement” method for assessing wetland functions or a specific regional function assessment method

173-700-340 Minimum buffers (1) The department, through the MBRT process, must determine a minimum buffer necessary for each bank. The minimum buffer for a bank must be sufficient to protect and enhance the functions at the bank.

(2) The department must consider the following criteria when it determines a minimum buffer for a bank:

- (a) The quality of the wetlands in the bank and the level of sensitivity of the wetlands to off-site activities;
- (b) The functions to be provided by the bank;
- (c) The quality of the buffer, (existing conditions and proposed conditions);
- (d) The functions that the buffer needs to provide; and
- (e) The intensity of adjacent land-uses.

(2) Minimum buffers shall generally range between 50 and 300 feet in width.

(3) The minimum buffer does not generate credit.

(4) The bank sponsor must provide at least the minimum buffer required by the department.

173-700-350 Credit description. The bank sponsor must provide a description of what the bank credits represent in the bank instrument.

(1) For credits determined using a conversion rate under WAC 173-700-353, the bank sponsor shall describe the credits in terms of acreage of: the wetland rating category; hydrogeomorphic (HGM) class, and Cowardin class of wetland. The credit description must list the ecological functions provided by the bank.

(2) For credits determined using an alternative method under WAC 173-700-359, the bank sponsor shall describe, in the bank instrument, the method used to determine the credits and what the credits represent.

173-700-351 Types of credits (1) There are three stages in the life of a mitigation bank credit:

- (a) Potential credit;
- (b) Available credit; and
- (c) Debited credit.

(2) Credits are initially called potential credits because while they are anticipated to be generated by the bank, they do not actually exist until the bank meets specific performance standards. After a bank attains the performance standards specified in the bank instrument and the department releases a potential credit, then that credit becomes an available credit.

(3) Only available credits can be used to meet permit requirements.

173-700-352 Determination of credits (1) Credits may be generated at a bank site through the restoration, creation, enhancement, or preservation of wetlands or a combination thereof.

(2) Preservation alone may generate credits under WAC 173-700-360.

(3) Buffer areas, beyond the minimum required under WAC 173-700-340, and upland habitats may generate credits to the extent that those areas contribute to the overall ecological functioning and sustainability of the bank.

(4) The department must give priority to the restoration of degraded or former wetlands when determining credits.

(5) The method for credit determination must be the same for the life of the bank.

(6) Debits and credits must be determined using the same method and be in the same unit of “currency”.

173-700-353 Default method for determining credits. (1) The department shall use acreage of wetland as the default credit unit for calculating credits at a bank site.

(2) The department, through the MBRT process, shall determine the number of potential credits at a bank using a credit conversion rate.

(3) The credit conversion rate uses a ratio of acre-credits generated at the bank site to acres of activity such as restoration, creation, enhancement or preservation:
(**Acre-credit : Acres of activity**).

(4) Except as provided in WAC 173-700-358, the department must determine the credit conversion rates for individual banks from within the ranges specified in this subsection.

(5) This section and WAC 173-700-354 through WAC 173-700-358 do not apply to banks using an alternative method to determine credits under WAC 173-700-359.

173-700-354 Wetland credit conversion rates The ranges for establishing conversion rates for wetland areas are as follows:

If the mitigation activity is:	The conversion rate can range from: Acre credit : Acre mit. activity
Restoration	1:1 to 1:2
Creation	1:1 to 1:5
Enhancement	1:2 to 1:6
Preservation: In combination with restoration or creation of wetlands	1:2 to 1:10
Preservation alone	1:5 to 1:20

173-700-355 Criteria for determining conversion rates for wetlands Unless an alternate credit determination method is used under WAC 173-700-359, the department, through the MBRT process, shall use the following criteria to determine specific conversion rates for wetlands on a bank site:

- (1) The anticipated net gains in wetland functions at the bank site;
- (2) The quality of the wetlands and habitats at the bank site;
- (3) The rarity of the wetlands and habitats at the bank site;
- (4) The degree to which the bank provides functions that are degraded or limited in a watershed;
- (5) The habitat value of the bank site;

- (6) The site's contribution to the protection or recovery, or both, of state or federally listed threatened or endangered species, protection of state priority species and habitats, and locally significant habitats;
- (7) The size, quality, and functioning of the buffers for the site;
- (8) The degree of connectivity to other habitats and open space areas;
- (9) The likelihood of the successful implementation of the site design and successful performance of the targeted wetland functions;
- (10) The quality of supporting information provided; and,
- (11) Public education and access, if ecologically appropriate.

173-700-356 Conversion rates for uplands and buffer areas (1) Buffers provided above and beyond the minimum buffer required under WAC 173-700-340 are eligible to generate credit. Such buffer areas are called eligible buffers.

(2) Eligible buffers and other upland habitats may generate credits at a conversion rate from 1:5 to 1:20.

173-700-357 Criteria for determining conversion rates for uplands and eligible buffer areas Unless an alternate credit determination method is used under WAC 173-700-359, the department, through the MBRT process, shall use the following criteria to determine specific conversion rates for uplands and eligible buffers on a bank site:

- (1) Degree of contribution to the ecological functioning of the bank;
- (2) The adequacy of the area to perform the desired function(s);
- (3) Adjacent land uses including foreseeable future land uses; and
- (4) Connectivity to other habitats and open space areas.

173-700-358 Exceptions to credit conversion ranges (1) The department, through the MBRT process, may allow a conversion rate for wetlands or non-wetland areas that are outside of the ranges specified in WAC 173-700-354 and WAC 173-700-356.

- (2) All exceptions for credit conversion rates authorized by the department must be:
- (a) Made on a case-by-case basis, considering the specific circumstances of a bank; and
 - (b) Based on ecological considerations.

173-700-359 Using an alternative method to calculate credits The department may allow the use of an alternative method to determine credits so long as:

- (1) The department, through the MBRT process, approves of the method;
- (2) The method is applicable and appropriate for the Pacific Northwest;

- (3) The method is applicable for use on projects debiting from the bank; and
- (4) The same method is applied to the bank throughout the operational life of the bank.

173-700-360 Credits for preservation (1) Preserving wetlands or associated uplands may generate credit when the preservation occurs in conjunction with the restoration, enhancement, or creation of a wetland.

(2) Preservation of wetlands as the sole means of generating credits may be approved in exceptional circumstances by the department, through the MBRT process if:

- (a) The area proposed for preservation is a high quality system; and
- (b) The area proposed for preservation is at risk because the wetland is under demonstrable threat of loss, or substantial degradation, due to human activities that might not otherwise be expected to be restricted.

173-700-361 Determining high quality wetland systems (1) The department shall determine whether a site is a high quality system for preservation when the preservation is the only credit-generating activity in a bank.

(2) The factors that the department must consider in making this determination include whether the wetland:

- (a) Has a Category I or II wetland rating (Category III only in exceptional cases);
- (b) Is a rare wetland type;
- (c) Provides habitat for threatened or endangered species;
- (d) Is located in a floodway, or in a portion of a floodplain that is documented as a frequently flooded area, or is providing flood retention and storage;
- (e) Provides biological or hydrological connectivity or both;
- (f) Is of high regional or watershed importance, such as listed as a priority site in a watershed plan; or
- (g) Contains high native species diversity.

173-700-370 Schedule for the release of credits (1) Releases of credits must be tied to the attainment of performance standards (See WAC 173-700-380) specified in the bank instrument.

(2) The department, through the MBRT process, shall determine a schedule for the release of credits at individual banks.

(3) The department must determine the number of credits to be released when the bank attains specific performance standards.

(4) The department shall base the number of credits to be released on, but not limited to, the following criteria:

- (a) The amount of ecological gain at the time of the release;
- (b) The bank sponsor's experience and success with similar types of wetland projects;

- (c) The expected length of time necessary to achieve project goals for wetland function performance and wetland types; and
- (d) The possibility of design failure.

(5) The bank sponsor shall include in the bank instrument the schedule for release of credits at the attainment of specific performance standards, and the amount of credit available for each release.

173-700-371 Limits on credit releases (1) The credit-release schedule and amount of credits eligible for release may not exceed the maximum amounts under WAC 173-700-372 through WAC 173-700-375.

(2) The department must release credits when it concurs that the bank has attained all of the performance standards required for a specific release.

(3) The maximum percentages of credits able to be released under WAC 173-700-372 through WAC 173-700-374 do not include credits generated by preservation of wetlands.

(4) The department, through the MBRT process, may release potential credits generated by the preservation of existing wetlands or aquatic resources after the minimum requirements specified in WAC 173-700-372 have been met.

173-700-372 Credit release - pre-construction (1) The department, through the MBRT process, must determine if it is appropriate to allow credits to be released from a wetland mitigation bank before a bank is constructed. The department must determine whether to allow pre-construction releases of credits on a case-by-case basis, which considers the particular ecological and economic circumstances of each bank.

(2) Initial physical and biological improvements must be completed within one year following the initial release of credits.

(3) The following criteria must be met prior to any release of credits:

- (a) The bank instrument is signed and approved;
- (b) The permanent protection mechanism and financial assurances are established; and
- (c) Ownership of the bank site is secured.

173-700-373 Credit release – after construction (1) Up to forty percent of the total potential credits may be released when the department, in consultation with signatory agencies, approves:

- (a) The complete implementation of construction plans; and
- (b) The as-built condition of the bank.

(2) Approval of the as-built condition of a bank includes the following steps:

- (a) The bank sponsor must submit, to the department, the final as-built plans that reflect the final grading and planting of the bank site, and sufficient copies of the final as-built plans for the bank's signatories;
- (b) The department must review the final as-built plans;

(b) The department, or its designee, must inspect the as-built condition of the bank. The department shall invite the bank's signatories and other interested members of the MBRT to inspect the as-built condition of the bank; and

(c) If the department approves of the as-built plans and the constructed condition of the site, then the department must release the amount credit specified in the bank instrument.

173-700-374 Credit release – Attainment of hydrologic performance standards

(1) Up to fifty percent of total potential credits may be released when the department, in consultation with signatory agencies, determines that the hydrologic performance standard(s), at a minimum, has been attained.

(2) The department, through the MBRT process, may require that additional performance standards be met prior to releasing up to fifty percent of the total potential credits.

173-700-375 Credit release - Final release (1) The department may not release all of the potential credits until the bank has fully attained all of the performance standards specified in the bank instrument.

(2) After a bank site has successfully attained all of its performance standards and the department concurs that all performance standards have been attained, the department must release all remaining potential credits.

173-700-376 Additional credit releases (1) Releases of credits earlier than those specified in the bank instrument may be approved by the department, in consultation with the signatories, as long as the maximum percentages for the release of potential credits specified in WAC 173-700-372 through WAC 173-700-375 are not exceeded.

(2) Earlier releases of credits may be warranted if the department, in consultation with the signatories, requests the sponsor to perform actions beyond those identified in the bank instrument in order to increase the projected functions of the site. Implementation of management activities that are necessary to attain the performance standards required in the bank instrument are not included.

(3) An addendum to the bank instrument shall document any deviation from the credit release schedule.

173-700-380 Performance standards (1) The bank sponsor must specify the bank's performance standards in the bank instrument.

(2) Performance standards must be based on the objectives and goals of the bank identified in the bank instrument and linked to a specific objective.

(3) Performance standards must identify measurable values for variables linked to specific objectives.

(4) The department, through the MBRT process, may require multiple years of monitoring data to document the sustainable attainment of specific performance standards, particularly hydrologic performance standards.

(5) A bank is considered fully successful when all of the performance standards specified in the bank instrument have been attained.

173-700-390 Financial responsibility (1) Certification of a wetland mitigation bank under this rule does not imply or guarantee the financial viability of the wetland mitigation bank.

(2) Bank sponsors are responsible for conducting any financial studies prior to implementation of a bank instrument to determine the financial risks and potential economic viability of the bank.

(3) The department may not consider the economic standing or condition of a bank when implementing mitigation sequencing, determining unavoidable impacts, or evaluating compensation alternatives for debit projects.

173-700-391 Financial assurances. (1) The department, through the MBRT process, must require that financial assurances be posted to ensure that the potential risks to the environment from unsuccessful mitigation banks are minimized.

(2) The department must determine the amount of financial assurances required on a bank-specific basis.

(3) The amount of financial assurances required by the department must be commensurate with the degree of risk of bank failure and the nature and extent of site alteration and development.

(3) The department may reduce the amounts of posted financial assurances over the operational life of the bank as the bank matures and the risk of failure is reduced.

(4) The bank instrument and the financial assurance mechanisms must specify the financial requirements and conditions, and the entity responsible for the release or cashing of the financial assurances.

(5) The department must determine the adequacy of the proposed financial assurances prior to certification.

173-700-392 Levels of financial assurances The department may require all of the following levels of financial assurances for mitigation banks:

- (1) Financial assurances for construction of the bank site;
- (2) Financial assurances for short-term management of the bank (see WAC 173-700-420);
- and
- (3) Financial assurances for long-term management of the bank (see WAC 173-700-421).

173-700-393 Financial assurances for construction. (1) When credits are released prior to the construction of a wetland mitigation bank, a financial assurance sufficient to cover the anticipated costs of construction shall be required prior to any release of credits.

(2) The amount of the financial assurance must be sufficient to cover the estimated costs for construction plus the costs for contract administration and overhead.

(3) Construction cost estimates must be based on the costs of having an independent contractor perform the construction of the bank. The sponsor must provide the department with two written estimates from qualified contractors.

(4) The department shall authorize the release of the financial assurance mechanism for bank construction after the department has approved the as-built condition of the bank.

(5) Banks may be developed in phases as specified in the bank instrument. If any credits are released prior to the construction of the bank or a phase of the bank, the department must require a financial assurance sufficient to cover the costs of construction of that phase plus administrative costs incurred by the department.

(6) The department may not require a financial assurance for construction if the first release of credits for a bank after the bank has been constructed and the department has approved the as-builts.

173-700-394 Financial assurances for short-term management. (1) The department must require a financial assurance for short-term management (See WAC 173-700-420) for all banks that have credit releases prior to full attainment of all performance standards.

(2) The amount of the financial assurance must be sufficient to cover all short-term maintenance activities under WAC 173-700-420 for the operational life of the bank.

(3) The cost estimates for short-term management must be based on the costs to have the applicable work in subsection (5) of this section performed by an independent contractor.

(4) The sponsor shall provide the department with two written estimates from qualified contractors.

(5) Monitoring and maintenance expenses used to determine the amount of the short-term management financial assurance may include, but are not limited to:

a) Estimated costs for a contractor to implement the contingency actions identified in the bank instrument;

b) Estimated costs of all monitoring activities required in the monitoring plan for the bank as specified in the bank instrument;

(c) Costs to implement the site plan, such as irrigation, control of invasive species, or phased planting; and

(d) Estimated costs for management activities required during the operational life of the bank as specified in the bank instrument (e.g. control of invasive vegetation or phased plantings), plus department costs for contract administration and overhead.

173-700-395 Financial assurances for long-term management (1) The department must require a financial assurance for the long-term management (see WAC 173-700-421) of a wetland bank site.

(2) The bank sponsor must secure sufficient funds for the anticipated long-term management costs as required by the department.

(3) The purpose of the long-term financial assurance is to ensure that the long-term manager or owner of a bank site has the financial resources available to perform the minimum responsibilities of any real property owner and ensure that the bank site remains in its natural condition.

(4) These responsibilities may include but are not limited to:

- (a) Payment of property taxes;
- (b) Control of noxious weeds;
- (c) Maintenance of structures such as water control structures, fences, trails or signs; and
- (d) Other long-term management activities required in the bank instrument.

(5) The bank sponsor must provide department with two estimates for the costs of annual maintenance of the bank site.

(6) If the ownership of the site is transferred in the future, the financial mechanism for long-term management must remain with the entity responsible for the long-term management of the bank.

PART V

OPERATION OF BANKS

173-700-400 Monitoring The goals of monitoring bank sites are to:

- (1) Document the post-construction baseline conditions at the bank site;
- (2) Document the condition of the bank site as it develops over time;
- (3) Document the attainment of performance standards; and
- (4) Provide early identification of problems in the site's development to trigger potential contingency actions.

173-700-401 Monitoring plan (1) The bank sponsor must develop a monitoring plan for each bank site and include it in the bank instrument.

(2) The monitoring plan must include:

- (a) A list of the bank's performance standards;
- (b) A description of the variables that will be monitored and how they will be evaluated;
- (c) A description of the methods or protocols used to monitor the identified variables;
- (d) A schedule of monitoring including details regarding the time of year, frequency, and duration;
- (e) A description of proposed photo documentation of the site; and

(f) A detailed contingency plan as outlined in WAC 173-700-402.

173-700-402 Contingency plan (1) Each bank instrument must include a contingency plan in case the bank fails to attain any performance standards.

(2) The contingency plan for a bank site must include the following elements:

- (a) Identification of potential causes for site failure;
- (b) Alternatives for contingency actions that may be required if the monitoring indicates that the site will not achieve specific performance standards; and
- (c) The bank sponsor's responsibilities in reporting and implementing contingency actions.

173-700-403 Duration of monitoring (1) The bank sponsor must monitor the wetland bank for at least five years.

(2) The department, through the MBRT process, shall determine a monitoring schedule for the bank that is of sufficient duration to show that the bank is progressing toward ecological success and sustainability. For example, longer monitoring periods may be required for banks that contain wetland systems that require more time to reach a stable condition (e.g. forested wetlands and estuarine restoration).

(3) The department may require additional monitoring at bank sites where contingency actions have been undertaken.

173-700-404 Monitoring reports (1) The bank sponsor must submit to the department monitoring reports that document the conditions and progress of the bank's development. Those reports must be submitted according to the schedule documented in the bank instrument.

(2) The monitoring report must identify by name and qualification the persons and organizations conducting the monitoring and must contain all data necessary to document compliance with performance standards and the bank instrument.

(3) The report must include, but is not limited to:

- (a) Photo points or referenced locations where photographs of the site are taken periodically to document site progress;
- (b) Data collected during the monitoring;
- (c) A narrative summary of the results of the monitoring;
- (d) Discussion of whether applicable performance standards were attained;
- (e) Discussion of recommended management activities to improve attainment of performance standards or performance of functions at the site;
- (f) Identification of any probable causes for failure of the bank to attain any performance standards; and
- (g) Recommendations for contingency actions, if applicable.

173-700-405 As-built reporting (1) Within sixty days after the completion of grading or planting, or both, the bank sponsor must submit to the department a post-construction report documenting the "as-built" conditions of the site.

(2) The bank sponsor must identify in the as-built report any variations from the site design plan approved in the bank instrument.

173-700-410 Obtaining credit releases (1) In order to obtain a release of credits, a bank sponsor must petition the department in writing for a credit release once the bank has met the required performance standards.

(2) The bank sponsor must send the department the petition and must include supporting documentation that the required performance standards have been met.

(3) The department must respond to the petition within thirty days of receipt of the written petition and supporting documents.

(4) The department, or its designee, may conduct an on-site inspection to verify that performance standards have been met. Bank signatories and members of the MBRT are encouraged to participate in the on-site visits.

(5) The bank sponsor must allow the department access to the site and to all documentation relevant to the requested credit release.

(6) The department must grant the release of credits upon its approval of the attainment of the required performance standards.

173-700-411 Recording credit transactions (1) When an available credit is debited from a bank, the bank sponsor must record each credit withdrawal transaction at the auditor's office of the county in which the bank is located.

(2) Any recording fees or other costs are the responsibility of the sponsor.

(3) Each credit withdrawal transaction must include the following:

- (a) The wetland mitigation bank application number assigned by the department;
- (b) Name of the person or entity purchasing credits;
- (c) Location of the debit project that is approved to use bank credits as compensation;
- (d) Debit project permit numbers and types;
- (e) Debit project impact acreage and wetland types; and
- (f) Date and number of credits sold or used.

(4) The bank sponsor must submit a copy of the recorded transaction to the department within thirty days of the auditor's office recording of each withdrawal transaction.

173-700-412 Accounting and tracking of credit transactions (1) The bank sponsor must maintain a separate credit -tracking ledger for each wetland mitigation bank that the sponsor develops.

(2) The bank sponsor must document all credit transactions in the credit-tracking ledger and maintain copies of all credit withdrawal transactions.

173-700-413 Credit-tracking ledger The credit-tracking ledger must include the following information:

- (1) Bank sponsor or owner name and contact information;
- (2) Wetland mitigation bank application number assigned by the department;
- (3) Legal description of the bank location;
- (4) Construction date of the bank;
- (5) Wetland types and target functions of the bank;
- (6) Dates and amounts of all petitions for release of credits;
- (7) A balance of all potential credits;
- (8) A balance of all available credits; and
- 9) Dates, amounts, and supporting information as listed in WAC 173-700-411 for all withdrawal transactions.

173-700-414 Annual account reporting (1) By the end of February of each year, the bank sponsor must submit to the department an annual transaction report.

(2) The annual transaction report must include a complete copy of the credit-tracking ledger and, if requested by the department, copies of all credit transactions from the previous calendar year.

173-700-415 Master ledger (1) The department shall maintain a master ledger for each bank and must cross check the bank sponsor's annual transaction report against the master ledger.

(2) The department must notify the bank sponsor within sixty days of receipt of the sponsor's annual report if that report conflicts with the master ledger.

(3) The bank sponsor is responsible for reconciling any discrepancies between the bank sponsor's credit-tracking ledger and the department's master ledger. If the bank sponsor fails to resolve any discrepancies, the department may suspend the further use of available credits under WAC 173-700-630.

173-700-416 Random audits (1) The department may conduct random audits during the operational life of a bank.

(2) The audit may include the department contacting the local jurisdiction(s) and the county auditor's office to verify all transactions listed in a bank's credit-tracking ledger.

(3) In the event of an audit, the bank sponsor must provide all supporting documentation requested by the department in order to verify transactions listed in the bank's credit tracking ledger.

(4) Unexplainable discrepancies between the public records and the bank's credit tracking ledger may result in the department initiating compliance actions under WAC 173-700-600 through WAC 173-700-630.

173-700-420 Short-term management (1) Short-term management includes all activities and actions necessary to ensure the successful development of a wetland bank.

(2) The period of short-term maintenance includes the entire operational life of the bank.

(3) Short-term management includes, but is not limited to, the following activities:

- (a) Actions necessary to implement the site plan such as, but not limited to, irrigation, control of invasive species, and phased plantings;
- (b) Regular monitoring of the site as described in the monitoring plan for the bank under WAC 173-700-401;
- (c) Ongoing maintenance activities required during the operational life of the bank as specified in the bank instrument. For example, a bank may require regular control of invasive species or maintenance of a water control structure; and
- (d) Implementation of contingency actions, if required.

173-700-421 Long-term management (1) The bank sponsor must provide long-term management of the bank in order to maintain the wetland bank in its natural state.

(2) The bank sponsor must describe in the bank instrument any anticipated management and maintenance activities.

(3) The long-term maintenance and management activities may include, but are not limited to:

- (a) Noxious weed control and removal of invasive species as needed;
- (b) Repair and maintenance of any structures on the site;
- (c) Repair due to vandalism; and
- (d) Tax assessments, utility fees, or other costs for the property on which the wetland bank is located.

(4) The sponsor must identify the long-term manager of the wetland bank either in the bank instrument or the conservation easement, or both.

(5) The department shall require a signed contract or agreement between the department and the long-term manager for the bank. That contract must specify the role and responsibilities of the long-term manager of the site(s).

(6) The owner of a wetland bank may not complete any conveyance of title, easement, lease, or other interest directly related to the wetland bank without adequate and complete provision for the continued management of the wetland bank in a natural state.

173-700-422 Permanent protection (1) Wetland bank sites must be permanently protected and preserved in their natural state. The department shall require that the bank sponsor use institutional controls to ensure the long-term protection and preservation of the bank site.

(2) Institution controls include:

(a) Legal and administrative mechanisms to limit site activities that are incompatible with the goals and purposes of the site. Examples include, but are not limited to, placing a conservation easement on the bank site and designating a long-term manager or steward for the bank;

(b) Physical measures to minimize adverse impacts to the wetland and its biotic community such as erecting signs, fencing, vehicle barriers, and designated trails; and

(c) Establishment of an endowment or trust for the long-term management of the site.

(3) Real estate arrangements must be approved by the department and secured prior to any release of credits. The real estate arrangements must transfer with the property.

173-700-423 Conservation easements for wetland banks The conservation easement for a wetland bank must:

(1) Prohibit alterations to the wetland bank that may interfere with the ecological functioning of the bank;

(2) Require the long-term manager of the wetland bank to notify the department if the owner conveys any interest in the wetland bank;

(3) Require the long-term manager of the wetland bank to notify the department and receive approval from the department for any proposal to use the wetland bank in a manner that is inconsistent with the conservation easement;

(4) Grant the department and its designated representatives the right to enter the wetland bank at reasonable times for the purpose of evaluating compliance with the terms of the bank instrument and the conservation easement; and

(5) Require the owner to include in any instrument conveying any interest in any portion of the wetland bank, notice of the conservation easement under this section.

PART VI

USE OF WETLAND BANK CREDITS

173-700-500 Available credits (1) Potential credits at a bank site that have been released by the department are referred to as “available credits”.

(2) An available credit may be used to provide compensation for unavoidable wetland impacts authorized under a federal, state, or local permit in accordance with the conditions of the bank certification and approved bank instrument.

(3) Permitting agencies for debit projects are responsible for determining if the use of available credits from a bank provides appropriate compensation for the debit project's unavoidable impacts.

173-700-501 Projects eligible to use a bank (1) Projects located within the bank's service area are eligible to apply to use credits from that bank for compensation.

173-700-502 Replacement ratios for debit projects (1) Replacement ratios used to determine compensation requirements for debit projects that use bank credits should generally be lower than those required for project-specific concurrent mitigation.

(2) The replacement ratios for debit projects should take into consideration that credit conversion rates for wetland banks include adjustments for the site's overall ecological benefit. Therefore, one acre-credit at a bank is not necessarily equal to one acre on the ground. In many cases one acre-credit from a bank represents more than one acre at the bank site.

(3) Replacement ratios for debit projects should reflect:

- (a) The existing risk of failure at the time credits are debited;
- (b) Any temporal losses;
- (c) Out-of-kind considerations; and
- (d) Compensation for the distance from the affected wetland to the bank site.

(4) Recommended replacement ratios for debit projects may be specified in a bank instrument.

173-700-503 Use of credits for fish habitat and hydrologic functions (1) Impacts to hydrologic functions and fish habitat may not be mitigated with credits from a bank that is located in a different WRIA from the impact site, unless the permitting agency(ies) determines that the use of credits from a bank is appropriate, and consistent with all other applicable laws, including but not limited to the Endangered Species Act and local recovery plans.

(2) Generally, impacts to salmonid fish habitat and hydrologic functions should be mitigated in the same stream reach or sub-basin, respectively, as the impact site.

173-700-504 Use of credits outside of the service area (1) The department, in consultation with the bank's signatories, may authorize the use of mitigation bank credits to compensate for impacts outside of the bank's designated service area if the department deems that use to be practicable and environmentally desirable.

(2) When a debit project located outside of the bank's designated service area requests to use bank credits as compensation for an authorized wetland impact, the bank sponsor must:

- (a) Provide written notice of the proposed use of credits and a request for comments to the department and the bank's signatories;
- (b) Convene a meeting of the signatory agencies, if necessary;
- (c) Obtain written approval from the department and the bank's signatories on the proposed use of credits;
- (d) Send copies of the approvals to the department; and
- (e) Include the approval documents as an addendum to the bank instrument.

(3) Linear projects, such as roadways, transmission lines, distribution lines, pipelines, or railways, may be eligible to use a bank even though all of the projects' impacts are not located within the bank's service area. However, the following conditions must be met:

- (a) At least one impact from the project must lie within the bank's service area;
- (b) The bank must provide appropriate compensation for the impacts; and
- (c) The determination to allow use of bank credits for impacts lying outside of a bank's service area must take into consideration the elements used in determining the bank's service area as listed in WAC 173-700-311.

173-700-505 Use of credits for more than one permit (1) A credit must only be used to compensate for one authorized impact to wetlands or aquatic resources. Once a credit has been used (debited), it may not be used as compensation for a different wetland impact authorized under another regulatory program.

(2) Some debit projects may require authorization under more than one regulatory program, (e.g. Section 404 authorization, local grading permit and a hydraulic project approval). A credit can be used to compensate for one impact that requires multiple authorizations for the same impact.

PART VII

COMPLIANCE WITH CERTIFICATION

173-700-600 Compliance with the terms of certification (1) It is the department's goal to ensure that the establishment and operation of a mitigation bank is consistent with the terms and conditions of the certification as specified in the bank instrument. The department may use one or more of the methods provided for in WAC 173-700-610 through WAC 173-700-630 to gain compliance of certified banks.

173-700-610 Contingency actions (1) If a bank is unable to attain the required performance standards specified in the bank instrument, the department may require that the sponsor implement contingency actions necessary to correct any site deficiencies.

(2) Upon the bank sponsor's determination that the bank is not or will not attain performance standards, the bank sponsor shall notify the department and the bank's signatories that the bank site will not attain the required performance standards.

(3) Any agency, entity, or person may also notify the department if it has supporting documentation that a bank site is not successfully meeting the required performance standards.

(4) The notification must include:

- (a) A clear statement of the problem;
- (b) Supporting documentation of the problem, such as photographic evidence, documentation from field reviews, the submitted monitoring report or the credit release petition; and
- (c) Recommendations for contingency actions or other alternatives to address the problem.

(5) The department, with recommendations from the bank's signatories, shall evaluate and determine the appropriate contingency actions required for the site. The department's determination for contingency action(s) must include:

- (a) A description of the contingency action(s) that must be undertaken;
- (b) A schedule for the sponsor to implement the required contingency action(s);
- (c) Any additional monitoring and reporting requirements for the bank, if applicable ; and
- (d) Any adjustments to the credits in the wetland bank and the credit release schedule.

(6) Interested signatories of the bank shall notify the department if they have comments on the proposed contingency actions as specified in WAC 173-700-740.

173-700-611 Notice of required contingency actions (1) The department must submit, in writing, its determination on required contingency actions to the bank sponsor and the bank's signatories.

(2) This determination must be attached as an addendum to the bank instrument.

173-700-612 Compliance with required contingency actions (1) If the bank sponsor does not complete the required contingency actions within the schedule specified in the department's determination for contingency actions, the department must notify the bank sponsor that it is out of compliance with the contingency requirements.

(2) The department must send the notification of non-compliance by certified mail with return receipt requested and must require a written response from the sponsor.

(3) The sponsor must respond in writing to the department within fifteen days of receipt of the non-compliance notification. The response shall include an explanation of why the sponsor has not implemented the required contingency actions and a schedule for when the sponsor will complete the required contingency actions.

(4) The department, in consultation with interested signatories of the bank, shall determine whether the reasons provided by the sponsor constitute extenuating circumstances and shall determine whether to extend the schedule for instituting contingency actions.

(5) If the department determines that the schedule should not be extended, the department must notify the sponsor by certified mail with return receipt requested that it intends to either:

- (a) Use the posted financial assurances to have the required contingency actions completed; or
- (b) Adjust the total number of potential credits at the bank under WAC 173-700-620.

(6) The department shall send a copy of the non-compliance notification to the bank's signatories.

(7) Thirty days after the date of the bank sponsor's receipt of the department's notification in subsection (5) of this section, the department may initiate the actions specified in the notification.

173-700-620 Adjustments in total credits (1) The department may adjust the final number of credits available at a bank based on actual conditions of the bank site at the time of the final release of credits.

(2) The department shall consult with a bank's signatories to determine whether the number of credits at a bank should be adjusted at the time of the final release of credits.

(3) The department may adjust the number of credits at a bank in the following ways:

- (a) The department, in consultation with the bank signatories, may reduce total number of credits at a bank site if all of the required performance standards cannot be attained;
- (b) The department, in consultation with the bank signatories, may increase the number of credits available at a bank site if:
 - (i) All of the required performance standards are met; and
 - (ii) The department determines that the site provides higher levels of function than was originally projected; or
- (c) After the department concurs that all of the required performance standards have been met, the department may recalculate the remaining available restoration and creation credits to achieve a conversion rate of one to one. The revised conversion rates for restoration or creation credits should be based on the criteria listed in WAC173-700-355.

173-700-630 Suspension of credit use (1) The department may suspend a bank's use of credits to bring a bank into compliance. If the department suspends the use of credits, credits may not be debited until the department lifts the suspension.

(2) The suspension shall include all available credits at a bank.

(3) The department may suspend the use of available credits for the following reasons:

- (a) If the department determines that a bank is out of compliance with the terms of its certification and the sponsor has not implemented the contingency actions required by the department;
- (b) If the department determines that a bank is not in compliance with the terms of its certification and that the sponsor has not made reasonable efforts to bring the bank into compliance; or
- (c) If the department determines that there is documented fraudulent use of the bank.

(4) If credit use is suspended by the department, the department must notify the bank sponsor by certified mail with return receipt requested that further use of credits has been suspended.

(5) The department shall maintain the suspension until compliance is achieved.

(6) The use of credits shall remain suspended until the department notifies the bank sponsor in writing that credit use may be resumed.

PART VIII

ROLES AND RESPONSIBILITIES

173-700-700 Responsibilities of the bank sponsor (1) The bank sponsor must meet the requirements of these rules.

(2) It is the responsibility of the bank sponsor to provide the wetland mitigation prospectus and bank instrument consistent with WAC 173-700-223 and 173-700-241, respectively.

(3) It is the bank sponsor's responsibility to incorporate specific elements required by the department and the MBRT into the final bank instrument.

(3) The bank sponsor is responsible for obtaining all required federal, state, and local permits and approvals for the construction and establishment of the wetland mitigation bank.

(4) The bank sponsor is responsible for assuring the success of the restoration, creation, enhancement, or preservation activities, or a combination of these activities, at the mitigation bank.

(5) The bank sponsor is responsible for the construction, operation, maintenance, permanent protection, and all costs including contingency actions, if required, and financial assurances for the mitigation bank in accordance with the bank instrument and this rule.

(6) The bank sponsor must secure adequate funds for the operation and maintenance of the bank during its operational life and the long-term management and permanent protection of the bank sites.

(7) The bank sponsor must secure real estate arrangements that will permanently protect the property on which the bank is located.

(8) The bank sponsor is responsible for the evaluation and protection of historic, cultural, and archeological resources of the bank site.

(9) The bank sponsor must monitor the development of the bank site and report findings to the department under WAC 173-700-404.

(10) The bank sponsor is responsible for submitting written petitions for releases of credits under WAC 173-700-410.

(11) The bank sponsor is responsible for the accounting and maintenance of ledgers regarding the deposit and withdrawal of credits from the mitigation bank under WAC 173-700-412 and WAC 173-700-413.

(12) The bank sponsor is responsible for obtaining all approvals for the bank's signatories when proposing to use credits in a manner that is inconsistent with the terms and conditions of the bank instrument.

(13) The bank sponsor may request the program manager of the Shorelands and Environmental Assistance Program to review actions taken to develop the bank instrument if the sponsor believes that a particular decision raises concern regarding the application of this rule, or that inadequate progress has been made by the MBRT on the bank instrument.

173-700-710 Role of the department (1) The department is responsible for making the final decision on bank certifications.

(2) The department must fully consider recommendations from the MBRT and public comments submitted as part of the certification process.

(3) The department is responsible for inviting members to and convening the MBRT. The department must serve as chair of the MBRT and shall invite the local jurisdiction to serve as co-chair.

(4) The department is responsible for maintaining master ledgers on certified banks and authorizing the release of credits as specified in bank instruments under WAC 173-700-415 and WAC 173-700-410, respectively.

(5) The department shall be responsible for approving financial assurances, and releasing financial assurances or cashing posted financial assurances to ensure compliance with the terms of a bank instrument.

(6) The department shall implement the compliance procedures as described in WAC 173-700-600 through WAC 173-700-630 if a bank is determined to be out of compliance with the terms of its certification.

(7) The department must determine the requirements for implementation of contingency actions when a bank is unable to attain its performance standards.

(8) If the sponsor does not achieve compliance with the terms of the bank instrument within the timeframe specified by the department, the department may suspend the use of credits as described in WAC 173-700-630.

173-700-720 Role of local jurisdiction(s) (1) For the purposes of this section, local jurisdiction(s) means the local jurisdiction(s) where the wetland bank site is located.

(2) The local jurisdiction(s) shall be invited by the department to participate on the MBRT.

(3) The local jurisdiction(s) may participate as co-chair of the MBRT with the department.

(4) After receipt of the department's decision to approve certification, the local jurisdiction(s) must review the certification and if it concurs with the decision, the local jurisdiction(s) must sign the bank instrument to indicate its concurrence with the bank certification.

173-700-730 Role of the mitigation bank review team (1) The purposes of a Mitigation Bank Review Team (MBRT) are to:

- (a) Assist in the development of bank instruments;
- (b) Facilitate the review of wetland mitigation bank proposals; and
- (c) Avoid duplicative processes for bank certification and approval.

(2) It is the role of the MBRT to help ensure that certified wetland banks are technically feasible and ecologically desirable.

173-700-731 Mitigation bank review team responsibilities (1) The MBRT shall participate in negotiations with a bank sponsor on the terms of a bank instrument.

(2) The MBRT shall review certification applications, and propose recommendations to the department, and the local jurisdiction(s) where the bank is located, on the certification of individual mitigation banks.

(3) MBRT representatives are responsible for notifying the department if they have comments for the department to consider on the requirements for contingency actions or on the release of credits.

173-700-732 Mitigation bank review team membership (1) The MBRT is composed of a maximum of 15 members representing agencies with an interest in the bank, including the department, the local jurisdiction(s), and appropriate representatives from federal, state, and local regulatory and resource agencies and tribes.

(2) Entities typically invited include, but are not limited to, the US Army Corps of Engineers, the Environmental Protection Agency, US Fish and Wildlife Service, National Marine Fisheries Service, Natural Resource Conservation Service, Washington Department of Fish and Wildlife, Washington Department of Natural Resources, tribes, and local jurisdictions within the proposed bank's service area.

(3) The department may invite interested members of the public or non-governmental organizations to participate on the MBRT as advisory members.

(4) The department shall serve as chair of the MBRT and shall invite the local jurisdiction(s) where the bank is located to serve as co-chair. For bank proposals seeking federal approvals in addition to state certification, the U.S. Army Corps of Engineers representative may also co-chair the MBRT.

173-700-740 Role of the banks' signatories (1) Signatory agencies for a bank are responsible for providing assistance to the department in overseeing the establishment and operations of that bank.

(2) Signatory agencies must notify the department if they determine that the bank is out of compliance with the terms of its certification and recommend whether compliance actions are warranted to bring the bank into compliance.

(3) Signatory agencies are encouraged to participate in field reviews of the bank site for determining:

- (a) Whether the as-built condition of the bank is correct;
- (b) Whether contingency actions need to be initiated on a bank site and what those actions should include; and

(c) Whether a credit release petition should be granted.

(4) Signatory agencies shall notify the department if they have any comments regarding the department's proposed contingency actions required under WAC 173-700-610.

(5) Signatory agencies should review and provide comments to the department on any proposed uses of bank credits that are inconsistent with the terms of the certification.

173-700-750 Role of permitting agencies authorizing use of credits (1) Permitting agencies should document that mitigation sequencing has occurred before approving the use of banking credits to compensate for unavoidable impacts.

(2) The purpose of the documentation is to ensure that the intent of the authorizing statute is met. The authorizing statute states that bank credits should only be used for remaining "unavoidable" impacts after all practicable avoidance and minimization has been implemented.

(3) The rationale used to conclude that the actions are unavoidable should be included in the permit file for the debit project using bank credits for compensation.

PART IX

APPEALS

173-700-800 Appeals process (1) A decision to issue, deny, or modify a final certification may be appealed to the pollution control hearings board under RCW Chapter 43.21B.